Filed 7/29/02 P. v. Heathman CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK DANIEL HEATHMAN,

Defendant and Appellant.

F038298

(Super. Ct. No. 204590)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Stanislaus County. Marie Savey-Silveira, Judge.

Alan Siraco, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, John G. McLean and David A. Lowe, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant, Mark Daniel Heathman, was charged with one felony count of possession of marijuana for sale (Health & Saf. Code, § 11359), and one misdemeanor

[*] Before Ardaiz, P.J., Buckley, J. and Wiseman, J.

count of possessing more than 28.5 grams of marijuana. (Health & Saf. Code, § 11357, subd. (c))

Appellant unsuccessfully moved to suppress the marijuana recovered from his home at his preliminary hearing. (§ 1538.5) He renewed the motion in the Superior Court pursuant to Penal Code sections 995 and 1538.5. The motions were denied, prompting appellant to plead no contest to possession of marijuana for sale, Count I. Count II was dismissed. He received a sentence of 120 days of jail time and three years of felony probation. He appeals the denial of his motion to suppress.

FACTS

At approximately 10:00 p.m. on January 10, 1999, five members of the Stanislaus County Sheriff's Office arrived at appellant's residence to investigate reports of marijuana sales. Officers knocked on the door of the residence and when it was not answered, concluded no one was home. As they left, appellant and two of his friends, Felip Solis and Daniel Martin, walked up the driveway.

Detective Pooley identified himself, stated that they had received information that appellant was selling marijuana out of his residence, and asked him to step inside so that they could speak away from his friends. Officers followed appellant into his home.

The interior of the house smelled strongly of marijuana. Appellant denied selling marijuana, but admitted that he used some for an eye condition. Appellant granted permission to search his bedroom for narcotics. Detective Pooley described the room as containing marijuana residue "pretty much all over the place." A small black duffel bag contained approximately 411.40 grams of marijuana packaged into 13 plastic baggies, and two small metal gram scales. Additional empty plastic baggies were also recovered from the bedroom. Pooley opined that the marijuana was possessed for sale as opposed to personal use.

At the preliminary hearing, appellant maintained that he did not consent to the officer's initial entry into his residence. Nevertheless, Detective Pooley testified that he

asked to speak privately with appellant; appellant then invited Pooley and Deputy Mercurio inside, telling them "Come on in. We'll talk inside." Deputy Mercurio reiterated that appellant invited the officers inside in response to their request.

Felip Solis, however, testified that he heard officers twice ask appellant for permission to search his house and that appellant refused both requests. Appellant told the officers that he was going into the house to talk to his sister, and the officers simply followed him in.

Daniel Martin testified that he heard the officers ask appellant, "May we come in," and appellant respond, "No." He never heard appellant grant the officers permission to enter his house. They just walked in behind appellant after he opened the door.

Shawdria Heathman, appellant's sister and housemate, testified that she was lying down, asleep, or nearly asleep when she heard her brother open the door. He said the police were present. She stated that she heard appellant say, "No. There's no reason for you to come in." When she walked out into the living room, officers were entering her brother's bedroom.

The magistrate made the following ruling at the conclusion of the preliminary hearing:

> "The Court had the opportunity to listen to the witnesses and view their demeanor during testimony. Both Mr. Solis and Mr. Martin had pinpoint clarity on details that would assist their friend and had a considerable lack of memory on other information requested by the district attorney. They appear to the Court to have a story to tell.
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> "They were not cooperative with the prosecutor on providing information requested, except that they were more than happy to volunteer, even if it was not a response to the question, if they thought it assisted their friend. I found them both utterly and completely incredible.
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> "I did not find the testimony of Ms. Heathman assisted the Court. Much of what she said was inconsistent with the other evidence I heard and found incredible, so for that reason the motion to suppress evidence is denied."

Appellant renewed his motion pursuant to Penal Code sections 995 and 1538.5, arguing that if the court found that appellant did consent to the search of his house, the consent was not voluntary. The trial court, although she stated she wished appellant had testified and that she was "troubled" by the fact that multiple officers were roaming appellant's yard at night, concluded that she was bound by the magistrate's evaluation of credibility and denied the motions.

CONTENTIONS ON APPEAL

Appellant contends he did not voluntarily consent to the law enforcement officers' entry into his home. He was detained, the officers misled him as to their intent to search the residence, and no reasonable person in appellant's position would have felt free to refuse consent. Moreover, appellant asserts that the trial court erred by accepting the magistrate's characterization of appellant's witnesses' credibility, as it was not supported by substantial evidence.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS

1. Waiver

A criminal defendant may move to suppress evidence at his or her preliminary hearing. (Pen. Code, § 1538.5, subd. (f)(1).) A defendant held to answer or indicted has the right to make or renew the motion in the superior court. (Pen. Code, § 1538.5, subd. (i).) However, "[i]f the motion was made at the preliminary hearing, unless otherwise agreed to by all parties, evidence presented at the special hearing shall be limited to the transcript of the preliminary hearing and to evidence that could not reasonably have been presented at the preliminary hearing...." (*Ibid.*) The superior court "shall base its ruling" on the transcript of the preliminary hearing and on the evidence presented at the special hearing. (*Ibid.*) "[T]he findings of the magistrate shall be binding on the superior court as to evidence or property not affected by evidence presented at the special hearing." (*Ibid.*)

Respondent claims appellant waived his argument that his consent to enter his home was involuntary by failing to advance it at his first motion to suppress at the preliminary hearing, citing *People v. Bennett* (1998) 68 Cal.App.4th 396. Although *Bennett* holds that a defendant who renews a motion to suppress may not raise theories at the second hearing not litigated at the preliminary hearing, we find the case distinguishable.

The defendant in *Bennett* filed a motion to suppress prior to his preliminary hearing; at the hearing he specifically abandoned two of his three grounds for the motion. The motion was denied. After the defendant was arraigned he filed a second motion to suppress advancing the same three contentions made in the prior motion to suppress. The prosecutor argued the second and third grounds were waived, but the trial court, troubled by the sparse nature of the record, convened a full evidentiary hearing and allowed the defense to litigate all its concerns. (*People v. Bennett*, *supra*, 68 Cal.App.4th at pp. 406-407.)

While we agree that allowing a defendant a full evidentiary hearing to relitigate issues raised in a first motion to suppress violates the spirit of Penal Code section 1538.5, the instant case presents a different scenario. Appellant submitted his renewed motion solely on the preliminary hearing transcript. Furthermore, the district attorney made no objection to appellant's new theory. Accordingly, the People waived their preclusion argument and we will consider the merits of appellant's contentions.

2. Standard of Review

In reviewing the denial of a motion to suppress evidence pursuant to Penal Code section 1538.5, we evaluate the trial court's express or implied factual findings to determine whether they are supported by substantial evidence. We then exercise our independent judgment to determine whether, on the facts found, the seizure of appellant was unreasonable within the meaning of the Constitution. (*People v. Glaser* (1995) 11

Cal.4th 354, 362; *People v. Williams* (1988) 45 Cal.3d 1268, 1301; *People v. Leyba* (1981) 29 Cal.3d 591, 596-597.)

When a suppression motion is first made at the preliminary hearing and later renewed in the superior court:

> "... we do not review the findings of the superior court since it acts as a reviewing, and not a fact-finding, court. Rather, 'the appellate court disregards the findings of the trial court and reviews the determination of the magistrate who ruled on the motion to suppress.' [Citation.] In doing so, 'all presumptions are drawn in favor of the factual determinations of the [magistrate] and the appellate court must uphold the [magistrate's] expressed or implied findings if they are supported by substantial evidence.' [Citations.]
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> "In reviewing the sufficiency of the evidence, '"[t]he power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the trial court's findings.' [Citations.] 'An appellate court must view the evidence in the light most favorable to [the prevailing party] and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.] 'Reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding.' [Citation.]" (*People v. Snead* (1991) 1 Cal.App.4th 380, 383-384, fn. omitted.)

Here, substantial evidence supports both the magistrate's findings on consent and the credibility of the witnesses and the trial court's determination that appellant's consent was voluntary.

3. Credibility

Appellant claims "the magistrate's extreme characterization of each of appellant's witnesses is not supported by the record." He argues that the witnesses, did not, as the magistrate found, testify inconsistently or withhold some information and volunteer other. Rather he contends, his witnesses were unsophisticated and bewildered by the cagey antics of the prosecutor. We reject appellant's conclusions.

First, the magistrate did not, as appellant suggests, disregard the witnesses' demeanor and non-verbal cues. The first sentence of her ruling emphasizes she paid close attention to the witnesses' demeanor as they testified. Thus, we are not in a position to reject the magistrate's conclusions on the cold record of the preliminary transcript. To the contrary, they appear sound.

We recognize that the district attorney's examination was something less than adroit. He asked many compound questions. It is also possible that Mr. Solis is of limited understanding. However, Mr. Solis was unable to coherently and consistently describe appellant's location when he refused to consent to the entry of his home, his own proximity to same, and his ability to perceive appellant's alleged refusal. Moreover, he was unwilling or unable to answer simple questions.[1] Nonetheless, he did non-responsively volunteer that appellant did not consent to the entry of his home on four separate occasions.

Mr. Martin's testimony was more lucid. He heard appellant deny the deputies access only once, while they stood at the front door. However, whereas Mr. Solis had testified to being questioned by the driveway and moved to the porch. Martin disclosed

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[1] "Q. Once the contact happened, what was the next thing that was said to you? A. They started searching me. Q. So they said, 'Who are you' and just started searching you? A. If I had marijuana or if I got any weapons, and I go, 'No, I ain't got nothing.' Q. Let's back up. [¶] When the contact first happened, what was the next thing that was said to you? A. After that they didn't ask me questions. They patted me down." "Q. And what did you see Mr. Heathman or those officers do? A. They asked him if they could search his house, and he told him no." "Q. Where was Mr. Heathman and the police officers when you first heard the police officers ask him if he could search his house? Was he out in front of the driveway or in the driveway? A. I heard him tell him twice." "Q. While you were being patted down, where were you looking? A. I was going like this (indicating). 'I got nothing.' Q. So you were looking down? You were looking down at the ground? A. What are you specifically trying to tell me?"

there were two driveways, he was questioned on one, Solis was questioned on the other, then they were both moved by a tree and from there to the porch.

Ms. Heathman admitted that their house was such that she could not have heard a knock at the door or conversation outside the door. Accordingly, she was not competent to confirm or deny Pooley and Mercurio's testimony that appellant consented to their entry outside the house.

On direct examination, Ms. Heathman testified that the first sound she heard was her brother opening the door. On cross-examination she stated she first heard her brother's keys jingling. Since she could not have heard him outside, her brother must have been in the process of coming in. However, when she went into the living room a few minutes later, her brother was still getting his keys out of the door. On direct examination she stated she heard her brother say, "No. There's not no reason for you to come in," from the living room. On cross-examination she testified she heard no conversation when she entered the living room.

We conclude that the magistrate's credibility determinations are supported by substantial evidence.

4. Consent

"In every case, the voluntariness of a consent is a factual question to be decided in light of all the circumstances. [Citation.] The trial court's findings, on the issue of consent, whether express or implied, will be upheld on appeal if supported by substantial evidence. [Citations.]" (*People v. Aguilar* (1996) 48 Cal.App.4th 632, 639-640; *People* v. *Jenkins* (2000) 22 Cal.4th 900, 973.) Consent may be inferred from a defendant's conduct. (*People v. James* (1977) 19 Cal.3d 99, 113.) Trial courts may accept an officer's testimony that defendant freely consented to the search even in the face of conflicting testimony from defense witnesses. (*People v. Ratliff* (1986) 41 Cal.3d 675, 687.)

Five factors are considered in assessing the voluntariness of consent, (1) whether the person was in custody; (2) whether the arresting officers had their guns drawn; (3) whether *Miranda* warnings were given;[2] (4) whether the person was told she has a right not to consent; and (5) whether the person was told a search warrant could be obtained. (*People v. Ramirez* (1997) 59 Cal.App.4th 1548, 1558.) The determination as to whether a particular consent is voluntary depends on the totality of the circumstances; no single factor is dispositive. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 227-234.)

Appellant contends the members of the Sheriff's Office deceived him by asking merely to speak with him in his residence when they intended all along to search it. There is no evidence of misrepresentation. Appellant was immediately informed that the officers were investigating whether he was selling marijuana from his residence. The officers stated they wanted to speak with appellant about his drug sales, and to do so out of earshot of his companions. Appellant did not dispute that his house smelled of marijuana. This odor provided ample cause to request permission to search the house.

Appellant contends the late hour, the number of deputies roaming his yard with flashlights, the questioning and detention of his friends, the fear of harm to his sleeping sister and niece, and the flanking presence of two law enforcement officers reasonably deprived him of the belief he could refuse consent. We disagree.

Ten o'clock at night is not an unreasonable hour to investigate drug sales. Detective Pooley was not in uniform. No officer drew a weapon. No evidence suggests that appellant was handcuffed until the marijuana was discovered. Police may stop a person, ask their identity and pose such questions as the person chooses to answer without violating the Fourth Amendment. (*Florida v. Royer* (1983) 460 U.S. 491, 497;

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

People v. Bouser (1994) 26 Cal.App.4th 1280, 1288.) The tenor of the overall contact was conversational and subdued.

In *People v. Ratliff, supra*, 41 Cal.3d 675, the California Supreme Court upheld a finding of consent even though the evidence revealed that several officers entered the suspect's home at 6:00 a.m., awakened him with drawn guns, placed him in handcuffs, and told him that a warrant would be sought if he refused to consent to the search. (*Id*. at pp. 678-679.) In light of this precedent, substantial evidence support's the trial court's finding that appellant voluntarily consented to the entry and search of his residence.

DISPOSITION

The judgment is affirmed.